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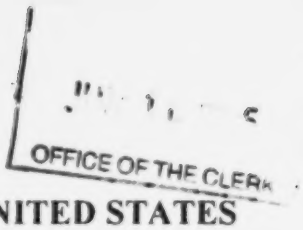

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

JAMES J. CLANCY, acting as a Private Attorney General and for himself,
PETITIONER

v.

A.T.&T. CORP., a New York Corporation; **COMCAST CORP.**, a Pennsylvania Corporation; and **COMCAST OF CALIFORNIA VII, INC.**, a Washington Corporation,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR REHEARING

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JUNE 10, 2005

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-1205

JAMES J. CLANCY, acting as a Private Attorney General and for himself, PETITIONER

v.

A.T.&T. CORP., a New York Corporation; COMCAST CORP., a Pennsylvania Corporation; and COMCAST OF CALIFORNIA VII, INC., a Washington Corporation, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 1.

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order: (1) vacating its denial of the petition for writ of certiorari, entered on May 16, 2005, and (2) granting the petition. There are intervening circumstances of a substantial or controlling effect, and other substantial grounds appearing in the "record" below not previously presented, which justify granting the petition in this case. As grounds for this motion, petitioner states the following:

I. THE "RECORD" FILED IN CONNECTION WITH PETITIONER'S REPLY MEMORANDUM HAS NOT BEEN EXAMINED BY THIS COURT.

In the week prior to the Court's decision of May 16th, in response to his specific inquiry, Petitioner was informed that the Clerk's office had not distributed to the Court the written Record and Trial Court Exhibits which Petitioner had Express Mailed in connection with

his Reply Memorandum (see Petitioner's Reply Memorandum at footnote 1 on page 2). The Clerk explained that it would not distribute the Record, because "the Court did not ask for the record."

The portion of the Record which was lodged was in response [1] to the Opposition claim that there is no "full record" to review (see Opposition Brief at page 4), and to rebut Respondents' attempt to miscast this case as being controlled by "state law," as opposed to important *federal law* issues. These documents demonstrate the fallacies in the state court's disposition of this case, and establish that Petitioner was denied important basic guarantees of adjudicative fairness, secured by the Federal Constitution.

The main issue here is *not* the question posed by the Respondents in their Opposition. [2] Rather, the *real* issue is: (1) whether or not the *procedures employed* [3] by the state court (in failing to grant Petitioner a hearing on the "*per se*" obscenity and the "*per se*" public nuisance nature of the contested material and in failing to

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[1] A party to a state court proceeding pending before the Supreme Court is free to refer to state court briefs and arguments in the course of filing any kind of a brief or motion in the Court. See Stern & Gressman, *Supreme Court Practice* (8th Edition), at § 3.18, pages 184-185.

[2] Respondents suggested this Court should focus on whether the Appellate Court erred in sustaining the demurrers and in dismissing the Complaint without leave to amend, *based only upon what was discussed in the Court Opinions*.

[3] Under California procedural law, on demurrer, the trial judge cannot look beyond the Complaint itself in making a determination as to whether the Complaint states a cause of action and whether Petitioner has standing to file such a cause of action. The trial judge (1) disregarded these California procedural rules, permitted Respondents to argue facts outside of the Complaint (concerning the content and character of the contested material, signal blocking and scrambling, see *infra* at footnote 8); (2) refused to look at the entire Complaint, see *infra* at footnote 4; (3) refused to adjudicate Petitioner's claim of standing [the Court orally explained to Petitioner that in dismissing the Complaint he was not reaching the issue of standing, see Reporter's Transcript for September 3, 2003, page 12, lines 13-14, in which the Court stated: "This is not a question of standing. I have ruled based upon the pleadings." Petitioner then asked: "Are you holding that I do have standing?" The Court responded: "No, I'm holding that I don't need to get to that. Thank you."]; and (4) refused to allow Petitioner to amend his Complaint in any way. The Complaint is still at the "pleading" stage! The Petition for writ of certiorari seeks relief from due process of law injury – Petitioner was never allowed to get to the trial stage, under the extrajudicial impediments imposed by the California court.

examine the Complaint in its entirety [4]) violated federal due process and equal protection of the law, and (2) whether the State of California improperly construed federal law as permitting and protecting the transmission of obscene Cable TV programming. [5] The portion of the

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[4]The Record establishes that the California court, in response to Respondents' arguments, dismissed the obscenity law causes of action, on the basis that the material alleged to be "obscene" was in fact "protected" without conducting an independent review of the obscenity *vel non* of the contested material, in violation of *People v. Noroff*, 58 Cal. Rptr. 172 (1967), *People v. Noroff*, 67 Cal.2d 791 (1967), and *Jenkins v. Georgia*, 418 U.S. 153 (1974). Moreover, the Record establishes that the California Court refused to look at and consider the supplemental factual allegations contained in the "Time & Motion" Studies which were attached to the Complaint and incorporated by reference. Review of this material would have established, beyond peradventure, that all the elements of the obscenity test articulated in *Miller v. California*, 413 U.S. 15 (1973) were present as a matter of law, and that Petitioner had alleged a *prima facie* violation of state and federal obscenity law.

Using innovative visual techniques, such as the "Time and Motion" Study and timed videotaped or DVD copies of films contested to be obscene, it is possible for a reviewing court to quickly ascertain whether, as a matter of law, the subject matter facially meets the Constitutional test for pleading obscenity expressed in *Miller v. California*, 413 U.S. 15 (1973), or whether, as a matter of law, it is "protected material" under federal law. This pleading technique was used and approved by the California court in the *Projection Room Theater* case. See *People ex re. Busch v. Projection Room Theater*, 17 Cal.3d 42 (1976) and *People ex rel. Busch v. Projection Room Theater*, 16 Cal.3d 350 (vacated) (1976). As a visual pleading technique, these materials constitute "facts" concerning the obscenity of the contested matter, and constitute factual allegations which can establish that the requirements of the three-pronged *Miller* test have been meet and that sufficient facts, setting forth a cause of action based upon obscenity law violations, have been pleaded. Using the fast forward device of a videotape or DVD player, it is possible to review 8 hours of obscene programming in approximately 1.5 hours, and to ascertain that each of the three elements of the *Miller* test has been met (*i.e.* pruriency, the use of patently offensive representations or descriptions of explicit sexual conduct, and lack of serious literary, artistic, political, or scientific value).

[5]The Trial Court issued its judgment based on a *misconstruction of federal law*, and, in addition, denied Petitioner his rights under applicable state procedural law, by refusing to review the Complaint in its entirety, before dismissing it. These violations denied Petitioner fundamental rights and deprived him of federal due process and equal protection of law. With respect to the propriety of the Cable TV Operators' conduct in transmitting sexually explicit, obscene Cable TV programming, the Record shows that the decision of the California Court to permit such conduct was premised on its interpretation of federal, not state law, and as such, is subject to review by this Court. See *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986).

Trial Court record (which is now in the hands of each Justice on this Court) shows these issues were raised but were completely ignored by the California courts. As a matter of Federal Constitutional law, the demurrers could not and cannot be sustained and the judgments of dismissal of Petitioner's Complaint without leave to amend could not and cannot be validly affirmed.

The federal interests at stake in this case cannot be satisfied by the state court's ordering that the text of its questionable opinions be "not published." They can only be vindicated by the Court's review of the Petition. Questions arising in actions in state courts relating to the scope or construction of federal law or rights guaranteed under the Constitution are, of course, federal questions which may appropriately be reviewed by this Court. [6/]

Respondent Cable TV Operator AT&T had argued that the Cable TV Operator's conduct (in transmitting sexually explicit material) was *protected* activity under federal cable law, and the California Courts adopted this reasoning. See Record at Exhibit 54, entitled "Plaintiff's Objections to Reply of Defendant AT&T Corp."at page 7, discussed *infra* at Point II. The Record shows that there is no "independent state ground of decision," because the state law relied upon by the Court incorporated federal law. *Cf. Delaware v. Prouse*, 440 U.S. 648 (1979). As grounds for sustaining the Cable TV Operators' demurrers, the California Court adopted the Cable TV Operators' argument that they could not be held liable for transmitting sexually explicit programming, even if alleged to be obscene under federal obscenity laws. It is evident that the state court misinterpreted federal law and believed itself to be bound by the Cable TV Operator's argument that federal precedents, such as *Playboy v. United States*, 529 U.S. 803 (2000), *protected* Respondents' activity. See discussion, *infra*, at Point II. A ruling by this Court, correcting the state courts' error, would free the state court to act against the transmission of obscene Cable TV programming. *Cf. S. Dakota v. Neville*, 459 U.S. 553 (1983); *Montana v. Jackson*, 460 U.S. 1030 (1983); and *Texas v. Brown*, 460 U.S. 730 (1983). Reversal of the state court's decision as to the Cable TV Operator's liability for the transmission of obscene Cable TV programming, would change the outcome of this case. See Erwin Chemerinsky, *Federal Jurisdiction, Second Ed.* (Aspen Lw & Business 1994) , at page 615: "If the Supreme Court's reversal of the state court's decision as to federal law would change the outcome in the case, then quite obviously, the Court can hear and decide the matter."

[6/] As stated in *St. Louis, Iron Mountain and Southern Railway Company v. Taylor*, 210 U.S. 281, 293 (1908):

> "Where a party to litigation in a state court insists... upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this

Inspection of the whole record leads to the inescapable conclusion of law that in dismissing petitioner's complaint both the California trial and appellate courts (1) misconstrued acts of Congress, and (2) denied petitioner due process and equal protection of law by their staunch refusal to review the complaint in its entirety and to follow California procedural and substantive law regarding demurrers.

II. *GONZALES V. RAICH* INDICATES THAT THE STATE COURT'S INTERPRETATION OF FEDERAL LAW IN THIS CASE CANNOT BE PERMITTED TO STAND.

Pursuant to the principles expressed in *Gonzales v. Raich*, No. 03-1454, (decided June 6, 2005), this Court should correct the State Court's misinterpretation of federal law concerning the federal issue involved. *Gonzales* is relevant to this case, because it indicates that where federal law regulates or bans an activity in a comprehensive manner, the state lacks the power to use state law to shield such activities [7/] or to issue legal interpretations that would place these activities beyond the reach of enforcement action. This case turns on the primary *federal* issue involved, namely, whether the contested Cable TV Programming under federal law is *obscene per se* and a *per se* public nuisance, or is merely some type of "Adult Material" falling

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respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.

"It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here." (Our Emphasis.)

[7/] Which in this case violate both state and federal obscenity law and which constitute a "*per se*" moral public nuisance.

outside the prescription and control of judicial action. [8/]

This case is of National importance. The state of California has erroneously "adjudicated" that federal law *blocks lawsuits against Cable TV Operators who are transmitting obscene* Cable TV programming. This state court misinterpretation of federal law gives rise to potentially harmful results of wider import than just the result in this one case. There is a legitimate federal interest of 49 other States in assuring that the federal obscenity laws are uniformly interpreted in the context of the delivery of Cable TV services.

III. A CORRECT INTERPRETATION OF FEDERAL LAW WILL CHANGE THE RESULT IN THIS CASE. RECENT AMENDMENTS TO CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200 DO NOT AFFECT THE CONTINUED MAINTENANCE OF THE COMPLAINT.

The Complaint alleges facts which support the conclusion that Respondent Cable TV Operators were engaged in an illegal commercial business scheme to make money by soliciting orders and transmitting obscene Cable TV programming into customer homes located in the Area D Cable TV Franchise in Los Angeles, California, in violation of state and federal obscenity law.

Respondents' decision to provide obscene material was made in a calculated business fashion, over the objection of its shareholders. [9/] In providing Cable TV subscription service to the Area

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[8/]The Complaint alleged, and Petitioner argued to both the trial and appellate courts, that the named Cable TV programming violated state and federal obscenity laws. The Cable TV Operators did not assert that this programming was "non-obscene" material; rather, they asserted that it was merely "sexually explicit" and incorrectly (but successfully) argued to the California Courts that it was "protected" by this Court's decision in *United States v. Playboy*, 529 U.S. 803 (2000). It is this Court's duty to correct the California Court's misconstruction of the federal obscenity statutes (47 U.S.C. §§ 558 and 559 and 18 U.S.C. § 1468), and the improper extension of the *Playboy* case to protect material which is alleged to be obscene.

[9/]See 2001 SEC No-Act. LEXIS 240. Before such service commenced, shareholders of Respondent Cable TV Operator AT&T questioned the policy behind

D Franchise customers, and in selling and transmitting obscene Cable TV programming. Respondent Cable TV Operators wrongfully advertise that such material was and is legal "adult material."

Respondents' transmission of obscene Cable TV programming violates California Business and Professions Code § 17200 *et seq.*, sometimes referred to as the "unfair competition law" or "UCL." [10/] Approximately three years after Petitioner [11/] filed his complaint

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the decision to provide "hard-core" sexually explicit programming and requested that it be placed before the shareholders at the annual shareholders' meeting in May 2001. The shareholder proposal requested a report on possible legal exposure, and called for the Company to "describe" the "legal issues," if any, which might arise with respect to the Company's pandering of pornography. The shareholders also expressed concern that organized crime was reported to have widespread influence and control of the sex industry, pointing to the 1997 guilty plea of Kenneth Guarino to Federal conspiracy charges, quoting newspaper reports stating: "Yesterday's plea agreement said Guarino, 47, and his business interests have been controlled for years by a top-ranking member of the New York based Gambino crime family, Natale Chris Richichi." In this regard, see *Capital Video Corp. v. Comm'r*, 311 F.3d 458 (2002)[rejecting the deductibility of legal fees paid for a defense against criminal charges], which stated at 461: "In 1979, Kenneth Guarino created and incorporated Capital Video Corporation, located in Cranston, Rhode Island; Guarino was the sole shareholder. Capital Video was a distributor of pornographic videotapes. Guarino was associated with Natale Richichi, a capo in the Gambino family of La Cosa Nostra, who dealt directly with the bosses of both the Gambino and Patriarca families and had influence with other factions of La Cosa Nostra." Guarino has been characterized as "an expert corporate shell shuffler" who created "dummy corporations and business spider webs to launder mob money, avoid taxes and set up large offshore savings accounts." See Internet article entitled "Ken Guarino," visited 6/9/2005, at http://www.lukeford.com/stars/male/kenneth_guarino.html. Respondent Cable Operator rejected the shareholders' objections, asserting that such matters related to "ordinary business operations."

[10/] The California Courts have held that violations of the state obscenity code, California Penal Code § 311.2, are specifically actionable under § 17200, see *People v. E.W.A.P.*, 106 Cal.App.3d 315 (C.A.2, Div. 5, 1980).

[11/] Petitioner is a former governmental attorney, who since 1965 to the present has specialized in providing legal services in support of law enforcement in the obscenity area, acting as consultant with state and federal law enforcement officials and legislators on obscenity matters. Petitioner has authored or co-authored *amicus curiae* briefs in support of law enforcement in obscenity litigation in over 40 cases before the United States Court; conducted seminars for law enforcement officials and prosecutors in various states; and given testimony before numerous legislative bodies

(November 2, 2004), a ballot initiative measure (Prop. 64) was adopted that amended the UCL by narrowing the standing requirement for §17204, but which retained the private citizen action for plaintiffs who have experienced some financial loss as a result of defendant's conduct. Because Petitioner will have no difficulty in meeting the new requirements [12/] (whether or not Prop. 64 is found to be retroactive [13/]) Prop. 64 does not bar Petitioner's action under the UCL based upon Respondents' illegal activity in transmitting obscene Cable TV programming.

CONCLUSION

Petitioner respectfully urges that the Members of this Court can no longer enjoy the luxury of dealing with the obscenity problem purely as an "abstract" issue, but must enter the "trenches" where the battle is raging. As a post-mortem analysis of "real life" problems,

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regarding enforcement procedures and reform of the law in the area of obscenity. During the past 35 years, Petitioner has successfully pioneered the development of a means of controlling the social problem of obscenity through an application of the civil public nuisance abatement lawsuit to the exhibition of *per se* obscene videotapes and motion pictures as moral public nuisances, with its attendant relief of compensatory and punitive damages, the ancillary remedies of constructive trust of box office receipts, forfeitures, injunctions and award of attorney fees. For the past 4 years (since 2001), he has devoted attention to developing a means of controlling the social problem of obscenity through a use of the civil public nuisance abatement lawsuit, joined with the use of state consumer protection laws.

[12/] The issue of retroactivity was not discussed in the trial court record which is before this Court, was not an issue on appeal, and does not now preclude this Court's review of the federal issues presented in the Petition. During the 3.5 years that Petitioner has pursued this case in the Courtroom, he has sought restitution for the moneys charged by Respondent Cable TV Operators, which he personally paid, and which were extracted by Respondents for their transmission of the obscene Cable TV programming named in the Complaint. In addition, the Complaint complies with the "class action" requirements of California Code of Civil Procedure § 382. Thus, the Record demonstrates that the Complaint complies with Prop. 64's new requirements for: (1) standing under § 17204 (Petitioner having suffered "injury in fact" and having "lost money or property as a result of such unfair competition"); and (2) the maintenance of representative actions under § 17203 (Petitioner having complied with CCP § 382). See Complaint, at paragraph 80, pp. 57-58.

[13/] The issue of the retroactivity of Prop. 64 is now before the California Supreme Court in *Branick v. Downey Savings and Loan Association*, S132433, see 2005 Cal. LEXIS 4598 (April 27, 2005), and 2005 Cal. LEXIS 5404 (May 18, 2005).

Petitioner is filing with this Petition (as **Exhibits 1** and **2**) 10 copies of two 8-hour videotaped recordings of the so-called "sexually explicit" Cable TV programming transmitted by Respondent Cable TV Operator Comcast [14], with a recommendation that each Justice and his or her respective law clerks view each tape in conference on a television monitor, using the "fast forward" mode, (which requires approximately 1.5 hours of viewing per 8 hour tape) in order to glean an understanding of the potential damage which will be wrought from failure to clarify the federal law in this area. This Court's opinion in *Playboy v. United States*, 529 U.S. 803 (2000) does not "protect" or insulate Cable TV Operators from being subjected to state or federal obscenity lawsuits based on the transmission of this type of material, where the Complaint alleges and contends that it is "*per se* obscene" and a *per se* public nuisance (*i.e.*, reasonable minds would not differ).

If the nine Members of this Court accept the Petitioner's challenge, they will acquire a "unique" understanding of what is at risk in this Court's deliberations in this particular case. [15] In the interest of preserving the proper respect for the Constitutional principles protecting Free Speech and the First Amendment, Petitioner respectfully urges that this Court take action. This grossly improper interference with the legitimate interests of society in the enforcement of the obscenity laws must be curtailed.

This Court can remove a serious roadblock by (1) vacating its denial of the petition for writ of certiorari in this case, entered on May 16, 2005, and (2) granting the petition. The subject matter of this lawsuit meets the pleading requirements and the obscenity test articulated in *Miller*, as a matter of law (reasonable minds would not differ). This Court should clearly reiterate that any Cable TV Operator responsible for the transmission over Cable TV systems operated by

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[14] Transmitted to Petitioner over Playboy Channel 451 on Monday, May 16, 2005 and on Tuesday, May 17, 2005.

[15] Many years ago, this Court observed in *Couch v. United States*, 409 U.S. 322 (1973):

> "It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws. . ." (Emphasis added.)

them of Cable TV programming which is obscene under *Miller*, may be subjected to liability under state and federal obscenity law, in accord with *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (App. DC, 1996), 320 U.S. App. DC 294, *reh. en banc, den.* 105 F.3d 723 (App. DC, 1997), 323 U.S. App. DC 109, 1996 U.S. App. LEXIS 22387 pages 69-72 (upholding the constitutionality of 47 U.S.C. § 558, which reimposes *criminal* liability on Cable TV Operators for the transmission of obscene programming). [16] Further, the now defunct *criminal exemption* had no effect whatsoever on the civil public nuisance abatement process. Now is the time to make that distinction clear in this civil public nuisance abatement lawsuit.

Dated: June 10, 2005

Respectfully submitted,

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[16] See *Time Warner*, 1996 U.S. App. LEXIS 22387, at 69-70, which states:

"We agree with the district court that the 1992 Act's revocation of cable operators' immunity from liability for obscene programming carried on . . .leased access channels does not violate the First Amendment. §10(d), 106 Stat. at 1486 (codified at 47 U.S.C. § 558). Section 10(d) merely imposes upon cable operators the same responsibility that others face. As the district court pointed out, 'no speakers--cable operators included--have a constitutional right to immunity' from obscenity liability. *Daniels Cablevision*, 835 F. Supp. at 11. . .; see also *Sable Communications*, 492 U.S. at 124-25. Although the 1984 Act initially made cable operators immune from any liability for obscene programming carried on . . . leased access channels, 1984 Act, § 2, 98 Stat. at 2801, 'Congress' earlier decision to provide cable operators with immunity was a matter of grace that it has always been free to rescind.' *Daniels Cablevision*, 835 F. Supp. at 11. Cable operators at times may find it difficult to determine which programs are obscene. However, such difficulties arise whenever the government regulates obscene materials; they are insufficient to render an antiobscenity law unconstitutional. *Fort Wayne Books, Inc. v.Indiana*, 489 U.S. 46, 60, 103 L. Ed. 2d 34, 109 S. Ct. 916 (1989); Denver, 116 S. Ct. at 2390 (plurality opinion)."

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2

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